

NOT FOR PUBLICATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Kendall La Shonne White,

Petitioner,

v.

Charles L. Ryan, *et al.*,

Respondents.

No. CV-15-02482-PHX-JJT

ORDER

At issue is Petitioner Kendall LaShonne White's Petition under 28 U.S.C. §2254 for Writ of Habeas Corpus (Doc. 1). United States Magistrate Judge James F. Metcalf issued a Report and Recommendation ("R&R") in the matter recommending denial and dismissal of the Petition (Doc. 8). The time to object passed over three months ago and no party has objected, timely or otherwise. The Court thus may accept the R&R without further review. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). The Court nonetheless has conducted its own review of the Petition, and for the reasons set forth in the R&R, this Court will deny and dismiss the Petition.

In the R&R, Judge Metcalf thoroughly and correctly analyzed the issues involved in the instant Petition, and because this Court will adopt the recommendations set forth in the R&R as well as the reasoning behind those recommendations, it will not restate those issues or their resolution here in detail. The R&R, in a very straightforward manner, reasons through the application of either a procedural bar or procedural defaults to each ground for relief set forth in the Petition.

1 Petitioner's Ground One—for ineffective assistance of counsel at his change of
2 plea hearing where counsel allegedly failed to advise him that his plea deal had
3 changed—was raised at Petitioner's *in pro per* PCR petition, but was found untimely
4 under Arizona's time bar, Ariz. R. Crim. Pr. 32.4, which bar has been found to be an
5 independent and adequate basis for denial of relief. Federal review of this ground is thus
6 barred.

7 Ground Two—wherein Petitioner claims his sentence violated the terms of his
8 plea agreement—was never presented to the Arizona Court of Appeals and therefore is
9 unexhausted, and is now procedurally barred under Arizona's time bar, Rule 32.4, and its
10 preclusion bar, Rule 32.2(a)(2).

11 Ground Three—Petitioner's claim of prosecutorial misconduct—was not
12 exhausted and also is now procedurally defaulted due to passage of time.

13 Ground Four—a separate claim of ineffective assistance of counsel because that
14 counsel left the room when Petitioner signed the plea agreement—was not exhausted
15 because it was never presented to the PCR court or the Arizona Court of Appeals, and is
16 now procedurally defaulted due to the passage of time.

17 Petitioner has failed to show either cause or prejudice sufficient to excuse his
18 procedural defaults on Grounds Two, Three or Four, or to overcome the procedural bar
19 on independent and adequate state grounds against maintaining Ground One, within the
20 meaning of *Reed v. Ross*, 468 U.S. 1 (1984). Petitioner failed to assert a basis for cause
21 and prejudice in his Petition, and once raised by Respondents in their limited response, he
22 failed to file any reply at all. Petitioner's claim of ineffective assistance of counsel in
23 failing to advise him of the change in plea offer was not raised in the PCR proceeding.
24 To the extent the Petition can be read to attribute that failure to ineffective PCR counsel,
25 it might be subject to analysis under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Judge
26 Metcalf conducted that analysis, and correctly concluded, for the reasons set forth in the
27 R&R, *Martinez* does not save the ground.

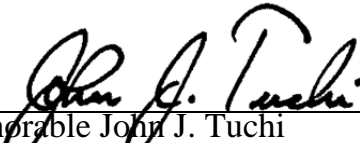
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1 IT IS ORDERED adopting Magistrate Judge Metcalf's R&R (Doc. 8) in its
2 entirety and incorporating same into this Order.

3 IT IS FURTHER ORDERED denying the Petition for Writ of Habeas Corpus
4 pursuant to 28 U.S.C. § 2254 (Doc. 1) and dismissing this matter with prejudice.

5 IT IS FURTHER ORDERED denying a Certificate of Appealability and leave to
6 proceed *in forma pauperis* on appeal in this matter because the dismissal of the instant
7 Petition is justified by a plain procedural bar and jurists of reason would not find the
8 procedural ruling debatable.

9 Dated this 1st day of September, 2016.

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12 Honorable John J. Tuchi
13 United States District Judge
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